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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1563

THE CITY OF EASTLAKE, ET AL.,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

On Writ Of Certiorari To The Supreme Court of Ohio

BRIEF OF AMICUS CURIAE STATE OF OHIO

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INTEREST OF STATE OF OHIO

The State of Ohio, by its Attorney General as chief law officer, has an interest in ensuring that all State laws are interpreted pursuant to controlling constitutional and statutory standards and authority. For this reason, the State of Ohio, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1975). *Forest City Enterprises, Inc.* v. *City of Eastlake.* The Opinions of the Eleventh District Court of Appeals, Lake County, Ohio, and the Court of Common Pleas, Lake County, Ohio, which are not reported, are printed in the Single Appendix at pages 23 and 19 respectively.

JURISDICTIONAL STATEMENT

The decision of the Supreme Court of Ohio was rendered on March 19, 1975. After a timely Petition for Re-hearing was denied on April 17, 1975, the City of Eastlake filed its Petition for Certiorari on June 12, 1975. That Petition was granted on October 14, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL, CITY CHARTER AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Fourteenth Amendment

Constitution of the State of Ohio
Article II, Section 1f
Article XVIII, Section 3

Charter of the City of Eastlake, Ohio
Article VIII, Section 3

Ohio Revised Code § 713.01 – 713.12

QUESTION PRESENTED

Whether the City of Eastlake's Charter provision which grants to municipal voters the power to reject or approve a change in the City's comprehensive zoning plan violates due process of law by subjecting a property owner's use of land to restrictions without any substantial relationship to the public health, safety, morals or general welfare of the community.

STATEMENT OF FACTS

Respondent, Forest City Enterprises, Inc., owned property within the City of Eastlake which, prior to May 18, 1971, was zoned for limited industrial use under Eastlake's zoning ordinances. On May 18, 1971, Respondent filed an application with Eastlake City Planning Commission and Eastlake City Council for a change in zoning of its property to multi-family, high-rise use. City Council, on December 28, 1971, enacted an ordinance approving Respondent's application for the zoning change.

In the interim, Article VIII, Section 3 of the Charter of the City of Eastlake was adopted as an amendment to the City Charter at the general election held on November 2, 1971. That charter provision requires all ordinances passed by City Council dealing with land use or development to be submitted to the municipal voters for approval or rejection. Before an ordinance can be effective, it must receive a 55 percent affirmative vote.

Pursuant to the enactment of Article VIII, Section 3 of the City Charter, the ordinance which granted Respondent's application for a change in zoning of its property was submitted to Eastlake voters at the primary election of May, 1972. The ordinance failed to obtain the necessary 55 percent affirmative vote, and Respondent was not

granted its application for the change in zoning which had been approved by City Council.

SUMMARY OF ARGUMENT

Article VIII, Section 3 of the City Charter of the City of Eastlake constitutes an unconstitutional delegation of legislative power to Eastlake municipal voters, because it enables them to approve or reject City ordinances which involve land use restrictions. Zoning legislation, or a change in a city's comprehensive land use plan, requires strict adherence to precise, constitutional standards mandated by the due process clause of the Fourteenth Amendment. City Council, or other governmental units, are the proper authority for ensuring that constitutional safeguards are adhered to prior to subjecting a land owner's property rights to use restrictions. To submit municipal ordinances that involve property rights to the municipal voting population for approval or rejection would subject property rights to restrictions totally unrelated to controlling constitutional standards, and may result in land use restrictions based upon mere whim, personal taste or caprice.

Alternately, there are state grounds which support the decision below, and the Ohio Supreme Court should have the opportunity to reconsider the state grounds should this Court determine that Article VIII, Section 3 of the Eastlake City Charter does not violate due process of law. The Ohio Supreme Court recognized that grants of relief from unnecessary hardship under a zoning plan are administrative acts not subject to referendum. Because the Ohio Supreme Court found that the Charter provision violated due process of law, it did not determine whether City Council acted in an administrative or legislative capacity in this instance. Therefore, should this Court determine that the Charter provision is lawful, the Ohio Supreme Court should have the opportunity to rule on whether Eastlake City Council acted in an administrative or legislative capacity.

Also, the Charter provision may violate the Ohio Constitution, Article XVIII, Section 3, which empowers municipal governments to enact regulations not in conflict with the general laws of Ohio. The Ohio Supreme Court recognized that a cumbersome zoning appeal process such as Article VIII, Section 3 of the Charter of Eastlake may involve serious constitutional questions; however, the Court indicated that it did not need to reach this issue, because it found the Charter provision in violation of due process of law. Moreover, Ohio Revised Code § 713.06 empowers municipalities to adopt zoning ordinances provided that the ordinances bear a relationship to the public interest. Unless Article VIII, Section 3 ensures that the public interest will be promoted by submitting land use restrictions to the voting populace, the Charter provision may be unlawful under Ohio statutes.

Therefore, because there are alternative state grounds which support the decision of the Ohio Supreme Court, it should have the opportunity to rule on these grounds even if this Court determines that the Eastlake City Charter provision is constitutional under the Fourteenth Amendment.

ARGUMENT

I. ARTICLE VIII, SECTION 3 OF THE EASTLAKE CITY CHARTER, WHICH REQUIRES MANDATORY VOTER APPROVAL OF ANY PROPOSED LAND USE CHANGE, DENIES DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Ohio Supreme Court held below that the Eastlake City Charter provision requiring submission of a zoning change, which had already been approved by City Council, to the city voters for approval constitutes an unlawful delegation of legislative power, repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The Court below correctly interpreted this Court's decisions in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *Richmond*, 226 U.S. 137 (1912), and distinguished this Court's decision in *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526 (1917), in determining that due process of law requires any changes in municipal zoning ordinances, which alter a property owner's use of land, to be founded on precise, constitutional standards and safeguards rather than upon the whim or caprice of the municipal population.

The constitutional flaw of the ordinance at issue herein is that it allows a minority of voters to determine, or even dispose of, the property rights of others, but creates no standards by which that power is to be exercised. This destroys any vestige of rights of ownership of private property, because there need be no relationship to the public health, safety, welfare, or morals in the zoning decision — mere caprice or arbitrary taste may control. *Eubank, supra*

at 143-144. The due process clause of the Fourteenth Amendment does not permit subjecting an individual's constitutional rights to property to the vagaries of the ballot box.

It is well settled that a municipal zoning ordinance which restricts or interferes with a property owner's use or enjoyment of his land will be upheld as a constitutionally valid exercise of the police power if it bears a substantial relationship to the public health, safety, morals, or general welfare of the community. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). This is the only basis upon which zoning restrictions on the use and enjoyment of property may rest. Yet, under Eastlake's Charter provision there need be no substantial relationship to any public purpose.

In accord with the requirements for zoning ordinances outlined in *Euclid* v. *Ambler Realty Co., supra,* and pursuant to authority granted by Article XVIII, Section 3 of the Ohio Constitution, the General Assembly of Ohio has passed legislation which enables its municipalities to enact comprehensive zoning ordinances, provided however, that such ordinances must be enacted in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare. Sections 713.01 — 713.12, Ohio Revised Code. By mandating that municipal zoning ordinances be in the public interest, the State of Ohio has recognized that the rights of a property owner to use and enjoy land must be unfettered by selfish, unreasonable or arbitrary interests. Only when the individual use of land must be limited to protect a substantive public interest does federal or state law permit interference with an individual's property rights.

After a careful analysis of this Court's decisions in *Eubank, supra*; *Roberge, supra*; and *Cusack, supra,* the Ohio Supreme Court held:

> Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. [citation omitted] The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational. For these reasons, the provision clearly violates the due process clause of the Fourteenth Amendment. 41 Ohio St. 2d 187, 196 (1975).

The facts in this case are similar to those set forth in *State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge, supra.* In that case, City Council for Seattle determined by its enactment of a zoning ordinance that a philanthropic home for children or the elderly would be appropriate for a residentially zoned district, provided however, that written consent of two-thirds of the owners of property within 400 feet of the proposed building first be obtained. This Court rejected the consent requirement of proximate property owners found in the ordinance, as repugnant to the due process clause, because there were:

> "no provision[s] for review under the ordinance; their [the proximate property owners'] failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject [the applicant] to their will or caprice." *Id.* at 122.

Upon the action taken by the City Council of Seattle alone to permit the building of the philanthropic home,

this Court recognized that Council's decision was founded in the public interest. *Id.* at 121. Similarly, the City Council of Eastlake, by granting Forest City Enterprises' application for a zoning change, acted pursuant to their official duty and aware of their public responsibility. Yet, despite the responsible action taken by Eastlake City Council, the approved application was submitted to a vote and rejected.

In *Roberge, supra,* the city ordinance at least attempted to relegate approval of the land use change to those persons most affected by changes within the neighborhood, *i.e.,* those property owners within 400 feet of the proposed philanthropic home. Yet, this Court rejected the approval requirement as an attempted delegation of legislative power in violation of due process standards. Here, the City of Eastlake, under the auspices of a referendum protected by the Ohio Constitution, attempts to relegate approval of land use changes made by City Council, no matter how small, to the consent of the entire municipal voting population, most of whom will have no substantial interest in the change. The constitutional infirmity of the delegation of legislative power exists whether that power is delegated to property owners within 400 feet of a proposed zoning change site, or to the entire voting population of a municipality.

II. EVEN IF THE REFERENDUM REQUIREMENT SET OUT IN ARTICLE VIII, SECTION 3 OF THE EASTLAKE CITY CHARTER IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SUCH REFERENDUM REQUIREMENT MAY BE UNCONSTITUTIONAL UNDER EITHER ARTICLE II, SECTION 1f OR ARTICLE XVIII, SECTION 3 OF THE OHIO CONSTITUTION, OR UNLAWFUL UNDER SECTION 713.06, OHIO REVISED CODE.

There are alternative state grounds which support the decision of the Supreme Court of Ohio. If this Court determines that the referendum requirement of Article VIII, Section 3 of the Eastlake Charter is not unconstitutional under the Fourteenth Amendment to the United States Constitution, the case should be remanded to the Ohio Supreme Court for a reconsideration of the state grounds which support the conclusion of the Ohio Supreme Court that such section of the Eastlake City Charter is invalid.

The Ohio Supreme Court did not address these state grounds in full because it found the charter referendum decision to be an unconstitutional delegation of legislative authority under the Fourteenth Amendment to the United States Constitution. Given the fact that "[z]oning . . . may indeed be the most essential function performed by local government . . ." *Belle Terre* v. *Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting), it is essential that the Ohio Supreme Court be permitted to fully address the state issues raised in this case, even if this Court disagrees

with the Ohio Supreme Court's interpretation of the Fourteenth Amendment's due process provisions.

The Ohio Supreme Court decision was based not only on the Fourteenth Amendment due process clause, but also on Article II, Section 1f of the Ohio Constitution. The first paragraph of the syllabus[1] of the Court states:

> 1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are "authorized by law to control by legislative action." (Paragraph one of the syllabus in *Myers* v. *Schiering*, 27 Ohio St. 2d 11, approved and followed.) 41 Ohio St. 2d 187

The opinion notes that even though the power to zone through passage of a comprehensive zoning ordinance is a legislative function subject to referendum, "[g]rants of relief from unnecessary hardship . . . are classified as administrative acts, regardless of the label placed on them," *Id.* at 190, and are not subject to referendum. Thus, if the procedure set out in Article VIII, Section 3 of the Eastlake City Charter to obtain a land use change is administrative, then it is not subject to referendum under Article II, Section 1f of the Ohio Constitution, and Article VIII, Section 3 of the Eastlake City Charter must fall. The Court stated that "[i]nsofar as this [charter provision] purports to mandate a referendum as to an administrative determination, it is clearly invalid." *Id.* at 191.

Rather than make a determination on whether the charter provision, as it related to the land use change sought by Forest City Enterprises, Inc., Respondent herein, was administrative or legislative, however, the Ohio Supreme

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[1] The syllabus in cases considered by the Ohio Supreme Court is prepared by the Court and is the statement of the law upon which the decision was reached. *See Beck* v. *Ohio*, 379 U.S. 89, 93 n.2 (1964); *Cassidy* v. *Glossip*, 12 Ohio St.2d 17, 23 N.E.2d 64 (1967).

Court chose to determine the constitutionality of the provision under the Fourteenth Amendment's due process clause by construing the referendum requirement as applying only to land-use changes made by City Council in a legislative capacity. Because the Ohio Supreme Court found that the referendum requirement denies due process of law under the Fourteenth Amendment, it was not necessary for the Court to go back and determine the administrative or legislative character of the land-use change decision.

The referendum requirement may also be unconstitutional under Article XVIII, Section 3 of the Ohio Constitution. That section states:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.

The procedures prerequisite to a land-use change are set forth in Article VIII, Section 3 of the Eastlake Charter, and govern "any change" in existing land use, or "any change whatsoever to any ordinance," or "the enactment of any ordinance," affecting the use of land. To effectuate such a proposed change of land use, no matter how small, the proposed change must first be approved by the City Planning Commission. Next, the change must be approved by the City Council. If Council approves, the change must be ratified by 55 percent of the voters of Eastlake at the next regular municipal election, or at a special election falling on the generally established election day, with the cost of the required election borne by the applicant.

The Ohio Supreme Court recognized that a cumbersome and costly zoning appeal process, "designed solely to delay

and discourage land-use changes", and bearing "no rational relationship to a valid police power objective . . . would present grave constitutional questions." 41 Ohio St. 2d at 196, n.4, citing *Burt Realty Corp.* v. *Columbus*, 21 Ohio St. 2d 265 (1970). The Court states, however, that because it determined that the referendum requirement denies due process of law, it is unnecessary to reach those other constitutional issues. The concurring opinion of Justice Stern, joined by a majority of the Ohio Supreme Court, states:

> There can be little doubt of the true purpose of Eastlake's Charter provision — it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive . . . The restrictive purpose of the provision is crudely apparent on its face. . . . [I]t is to render change difficult and expensive under the guise of popular democracy. *Id.* at 199-200.

If this Court reverses the due process holding of the Ohio Supreme Court, the Ohio Court then must have an opportunity to address those "grave constitutional questions."

In addition to being unconstitutional under the two Ohio Constitutional provisions discussed above, the Eastlake City Charter referendum provision may also be unlawful under Section 713.06, Ohio Revised Code. This statute delegates charter power to municipalities and provides in part:

> Any municipality may frame and amend a charter for its government . . . name and adopt a plan for dividing the municipal corporation or any portion thereof into zones or districts . . . in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare.

Thus, while Eastlake has power over zoning, its zoning

enactments must promote some public purpose. Justice Stern's concurring opinion states:

> . . . a law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose. 41 Ohio St. 2d at 200.

Because the Eastlake City Charter provision furthers no proper public purpose, it is unlawful under Section 713.06, Ohio Revised Code.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Ohio Supreme Court that the Eastlake City Charter referendum requirement denies due process of law under the Fourteenth Amendment to the United States Constitution. In the alternative, if this Court determines that there is no due process violation, this matter should be remanded to the Ohio Supreme Court for full consideration of the sufficient Ohio constitutional and statutory grounds supporting the judgment of that Court.

Respectfully submitted,

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